

**Indeck Energy Services of Turners Falls, Inc. and Local 455, International Brotherhood of Electrical Workers, AFL-CIO, CLC.** Case 1-CA-32512

August 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

Pursuant to a charge and an amended charge filed on January 20 and April 3, 1995, respectively,<sup>1</sup> the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on April 28, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by, inter alia, refusing the Union's request to bargain following the Union's certification in Case 1-RC-20089.<sup>2</sup> (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and amended answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 3, 1995, the General Counsel filed a Motion to Transfer Proceeding to the Board and for Partial Summary Judgment.<sup>3</sup> On July 5, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On August 3, 1995, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Partial Summary Judgment

In its amended answer the Respondent admits that the Union was certified as the exclusive bargaining representative of the unit employees, but attacks the validity of that certification on the basis of its objections to conduct alleged to have affected the results of

the election and the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.<sup>4</sup> The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.<sup>5</sup> We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

In its amended answer, the Respondent also denies the allegations that the Union requested bargaining on November 17, 1994, and that the Respondent has refused to bargain since the August 26, 1994 election. We find that neither of the Respondent's denials in this regard raise any issue warranting a hearing in this proceeding. A copy of the Union's November 17 letter requesting bargaining is attached as an exhibit to the General Counsel's motion, and the Respondent has not disputed the authenticity of that letter in its response to the Notice to Show Cause. Further, nowhere in its answer or response does the Respondent contend that it has offered or agreed to meet and bargain with the Union since its November 17 demand and subsequent February 14, 1995 certification. Rather, it is clear from the Respondent's answer and response that the Respondent is in fact refusing to bargain with the Union in order to test the Union's certification.

Finally, the Respondent's amended answer also asserts as an affirmative defense that the complaint is barred in whole or in part by the 6-month statute of limitations set forth in Section 10(b) of the Act. We reject the Respondent's contention in this regard. The Respondent's amended answer admits that the original and amended 8(a)(5) charges here were filed and

<sup>1</sup> Although not mentioned in the complaint, the General Counsel's motion also refers to and attaches as an exhibit a second amended charge dated April 26, 1995. The second amended charge appears to be the same as the amended charge filed on April 3, 1995, except that it omits certain 8(a)(3) allegations that were included in the amended charge.

<sup>2</sup> The complaint (pars. 10-12) also alleges that the Respondent violated Sec. 8(a)(5) and (1) of the Act by taking various unilateral actions in September, October, and December 1994, following the August 1994 election. The General Counsel, however, does not seek summary judgment with respect to those allegations. Rather, summary judgment is sought only as to those portions of the complaint which relate to the Respondent's refusal to honor the Union's subsequent certification.

<sup>3</sup> As indicated above, the General Counsel does not seek summary judgment with respect to pars. 10-12 of the complaint.

<sup>4</sup> The Board's decision overruling the Respondent's election objections and certifying the Union is published at 316 NLRB 300 (1995).

<sup>5</sup> In its response to the Notice to Show Cause, the Respondent asserts that it is seeking to introduce new evidence that in December 1994, after the August 1994 election, it conferred statutory supervisory authority on its shift supervisors, and that its contention that this new evidence renders the unit inappropriate has not previously been litigated. As the Respondent acknowledges, however, it previously sought to introduce the same evidence in its March 7, 1995 motion to reopen the record in the representation proceeding, which the Board denied as without merit by order dated June 6, 1995. Thus, this issue has been litigated in the representation proceeding. In any event, we find that the Respondent's proffered evidence of changes in supervisory duties occurring subsequent to the election does not constitute newly discovered and previously unavailable evidence in this proceeding warranting a hearing. See *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979).

served in January and April 1995,<sup>6</sup> dates which are well within 6 months of the Union's November 17, 1994 demand for bargaining and February 14, 1995 certification.<sup>7</sup> The allegations here are therefore clearly timely under Section 10(b).

Accordingly, we grant the Motion for Partial Summary Judgment.<sup>8</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business located in Turners Falls, Massachusetts, has been engaged in the production, transmission, and sale of industrial steam and electricity.<sup>9</sup> Annually, the Respondent, in conducting its business operations, purchases and receives at its Turners Fall's facility products, goods, and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Certification*

Following the election held on August 18 and 26, 1994, the Union was certified on February 14, 1995,

<sup>6</sup>The original charge alleged that the Respondent had made unilateral changes in wages, hours, and working conditions of unit employees without bargaining with the Union, and that some of these changes were designed to circumvent the Regional Director's unit determination in the underlying representation proceeding. The April 3, 1995 amended charge alleged that the Respondent had continuously refused to bargain with the Union since August 1994 in order to test the Union's certification, and also specifically alleged the various unilateral actions which are alleged in pars. 10-12 of the complaint.

<sup>7</sup>Although the complaint alleges that the Respondent has unlawfully refused to bargain since August 26, 1994, the date of the election, we find it unnecessary to decide this issue. The complaint apparently alleges a refusal to bargain since the election date as a predicate for the allegations in pars. 10-12 that the Respondent's alleged unilateral actions in September, October, and December 1994 violated Sec. 8(a)(5) of the Act. As indicated above, the General Counsel is not seeking summary judgment as to those allegations, but only as to those allegations pertaining to the Union's certification. In these circumstances, we need only find that the Respondent has refused to bargain since the Union's certification, and need not address whether the Respondent has unlawfully refused to bargain since the election.

<sup>8</sup>The remaining allegations of the complaint (pars. 10-12), on which summary judgment is not sought, are remanded to the Regional Director for further appropriate action.

<sup>9</sup>Although the Respondent's amended answer denies that it sells electricity on a "retail" basis as alleged in the complaint, it admits the remaining jurisdictional allegations.

as the collective-bargaining representative of the employees in the following appropriate unit:

All operations and maintenance employees employed by Respondent at the Turners Falls Energy Center in Turners Falls, Massachusetts, including shift supervisors, shift operators, shift mechanics, maintenance leader, electrician, and instrument and control technician, but excluding the office manager, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

###### B. *Refusal to Bargain*

Since November 17, 1994, the Union has requested the Respondent to bargain, and, since February 14, 1995, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since February 14, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

#### ORDER

The National Labor Relations Board orders that the Respondent, Indeck Energy Services of Turners Falls, Inc., Turners Falls, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 455, International Brotherhood of Electrical Workers, AFL-CIO, CLC as

the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All operations and maintenance employees employed by Respondent at the Turners Falls Energy Center in Turners Falls, Massachusetts, including shift supervisors, shift operators, shift mechanics, maintenance leader, electrician, and instrument and control technician, but excluding the office manager, guards, and supervisors as defined in the Act.

(b) Post at its facility in Turners Falls, Massachusetts, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 455, International Brotherhood of Electrical Workers, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All operations and maintenance employees employed by us at our Turners Falls Energy Center in Turners Falls, Massachusetts, including shift supervisors, shift operators, shift mechanics, maintenance leader, electrician, and instrument and control technician, but excluding the office manager, guards, and supervisors as defined in the Act.

INDECK ENERGY SERVICES OF TURNERS  
FALLS, INC.